No. 92-94

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*

All active Catholic Bishops in the United States are members of the United States Catholic Conference, a nonprofit corporation organized under the laws of the District of Columbia. The Conference advocates and promotes the pastoral teaching of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, criminal justice, and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its

people throughout the United States. Of the values that the Conference seeks to promote through its participation in litigation, one of the more important is to resist discrimination on account of religious belief and conscience.

In this case, a public school district has unjustly discriminated against the Zobrest family. They are deprived of a benefit, a sign language interpreter for their child, available to all other similar children in the School District except to those who choose religiously affiliated schools. To sustain this result, the courts below relied on an extreme view of this Court's jurisprudence under the Establishment Clause. The courts were willing to tolerate discriminatory treatment of private individuals on account of their religiously motivated actions. No governmental benefit is extended to religion here. Rather, the consequence of this State action is to deny a much needed public benefit to a needy child. The Conference believes that this Court should instruct that the Establishment Clause is not violated by assisting a needy family under the Education of the Handicapped Act. Indeed, denial of the benefit in this case violates fundamental notions of equality and fairness protected under the Equal Protection Clause.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

Through the Education of the Handicapped Act ("EHA"),[1] Congress guaranteed that every family facing the problem of how best to educate their disabled child will have the benefit of public assistance. Under the Act, state and local educational agencies assist chil-

[1] The Education of the Handicapped Act was retitled as Individuals with Disabilities Education Act in P.L. 101-476, sec. 901, 104 Stat. 1141-42 (1990), 20 U.S.C. §§ 1400 *et seq.* Because the Ninth Circuit's opinion references the EHA, we will do the same in this brief for reasons of consistency.

dren—whether blind, deaf, or otherwise disabled—to help mitigate conditions that might in any way impede their educational progress. Congress thought that this benefit was so important to the public welfare that it mandated that such services should be made available to all children regardless of the school they attend. 20 U.S.C. §§ 1400 (c), 1413(a)(4). Indeed, Congress found that providing services to all disabled children regardless of the school they might attend was essential "to assure equal protection of the law." 20 U.S.C. § 1400(b)(9). Failure to provide services in this case based on religion violates fundamental rights assured to all citizens under the first and fourteenth amendments.

In this case, James Zobrest was denied the services of a sign language interpreter necessary for him to participate fully in classes at Salpointe Catholic High School in Arizona. His parents believed that the best education for him would be in a religiously affiliated school. Acting on the Zobrests' application under the EHA, the School District said that services could be made available *only* if the Zobrests chose a public or nonsectarian private school. The School District thought that the presence of an interpreter in a religious school would violate the Establishment Clause. The Ninth Circuit agreed. *Zobrest v. Catalina Foothills School District*, 963 F.2d 1190 (9th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3061 (1992) (No. 92-94). That classification on religious grounds is unfair and constitutionally flawed. Such an exclusion from public benefits based on religion plainly violates the Equal Protection Clause of the fourteenth amendment. No adequate justification exists for this invidious discrimination.

The Ninth Circuit believed that limitations on the constitutional rights of the Zobrest family were justified because, in its view, providing an interpreter to the Zobrests, in light of their choice of a religious school, would violate the Establishment Clause. If true, the

Ninth Circuit's decision means that an Establishment Clause violation supplants every other constitutional right and interest. This extreme result has never been endorsed by this Court. Indeed, precedent in this Court is to the contrary. *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963) (Establishment Clause concerns do not override free exercise rights). Similarly, this Court has never indicated that a classification based on religion which has the effect of assuring unequal treatment and discrimination on account of religion can be justified by the Establishment Clause. In fact, there is every indication that classifications along religious lines would themselves violate the Establishment Clause. *Larson v. Valente*, 456 U.S. 228 (1982).

This Court has long taught that the Establishment Clause was designed to prevent hostility along religious lines. It has interpreted the Clause to assure that religion will enjoy "benevolent neutrality," not "hermetic separation." More to the point, benevolent neutrality means citizens can expect that government will not be openly hostile to them on account of their religious choices. Yet, the Zobrests' privately motivated choice of a religious school for their son disqualified them from the benefits of a public welfare program, contrary to history, tradition, and precedent under the Establishment Clause. In this case, a straightforward application of *Witters v. Wash. Dep't of Services for the Blind*, 474 U.S. 481 (1986), and *Mueller v. Allen*, 463 U.S. 388 (1983), mandates that the Zobrests should not be denied a public benefit simply because they chose to send their son to a religious school. No elaborate analysis, or application of the three-part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is necessary to reach this result.

In deciding Establishment Clause cases, this Court should expressly discard "symbolic union" as part of its jurisprudence. Failing to find any actual establishment of religion, the Ninth Circuit in this case relied on

symbolism and perceptions, thereby shielding its subjective views in language of doubtful constitutional utility. In the last analysis, this Court must reinforce that private individuals do not surrender their right to public benefits once they walk inside the door of a religious school. The only message—symbolic or real—that the Zobrest family could have understood in this case was one of government hostility to religion. That message stands in marked contrast to the law and values of this Court and the Constitution. Religious discrimination has no place in this society.

ARGUMENT

I. PROVISION OF A STATE-PAID SIGN LANGUAGE INTERPRETER TO A DEAF STUDENT ATTENDING A RELIGIOUS SCHOOL DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The express purpose of the Education of the Handicapped Act is to provide needed special education and related services to all children with disabilities, including those attending private religious schools. 20 U.S.C. §§ 1400(c), 1413(a)(4). The Ninth Circuit nonetheless found that such services for students in religious schools would create a "symbolic union" between government and religion and thereby violate the Establishment Clause. *Zobrest*, 963 F.2d at 1194. The School District, supported by the Ninth Circuit, has singled out religiously motivated choices for special adverse treatment. This is contrary to the principle of benevolent neutrality embodied in the first amendment as well as settled precedent of this Court interpreting the Establishment Clause. Provision of an interpreter to James Zobrest, consistent with the EHA, is not unconstitutional.

A. The Callous Treatment Suffered By The Zobrest Family Is Precisely The Kind Of Hostility Forbidden By The Religion Clauses.

Through the Establishment Clause, the Framers of our Bill of Rights attempted to protect two important values. First, they were concerned about the derogation of individual religious liberty if the state could sponsor religion or religious activity to the exclusion or disadvantage of others. *See Wallace v. Jaffree*, 472 U.S. 38, 91-107 (1985) (Rehnquist, J., dissenting). At the same time, they were concerned that a new government could not survive under conditions in which its own independence could be compromised by the hegemony of strong churches already in existence. They also recognized, through lamentable experience, what happens to religion when a powerful state dominates churches. Many of the Framers themselves were from denominations that had been subjected to persecution on religious grounds in the Old World and in the New. Thus, through the Religion Clauses, the Framers protected institutional autonomy between government and churches. "The objective is to prevent, as far as possible, the intrusion of either [the state or religious institutions] into the precincts of the other." *Lemon*, 403 U.S. at 614. In doing so, they denied to churches the ability to interfere in the operation of government or the exercise of the power of governance. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982). So, too, they denied to government the opportunity to finance, promote, or sponsor religious activities. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). In its caselaw, this Court has concerned itself with the protection of one or the other or both of these values.

Over forty years ago, this Court held that government cannot exclude individuals from the benefits of public welfare legislation because of their faith, or lack of it. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). The Court cautioned that "we must be careful, in protecting . . . against state-established churches, to be sure that we do not inadvertently prohibit [a State] from extending its general State law benefits to all its citizens without regard to their religious belief." 330 U.S. at 16. "[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring). Rather, the government must be neutral on religion and religious matters, not antiseptically so, but benevolently neutral, to allow for religious actions "without sponsorship and without interference." *Walz*, 397 U.S. at 669. Nowhere in its opinion does the Ninth Circuit explain how the provision of a sign language interpreter for James Zobrest raises any of the concerns to which the Establishment Clause is addressed.

No one's religious liberty is being compromised in any respect by the provision of a sign language interpreter. The State is not sponsoring, financing, or engaging in religious activity. The interpreter is simply a conduit for information coming from the hearing world to James Zobrest. It is this medium that the State is empowered to provide through the EHA. It is this medium that the State denies through its discriminatory treatment of the Zobrest family on account of their private, conscientious decision to choose a religious school for their child.[2] It is as if the government has decided that, because of the likelihood that some religious messages will be passed through this medium to James Zobrest, no messages at all can be passed. Unfortunately, the message the State *has* passed to James Zobrest is that private religious choices, even ones motivated by deeply held conscientious values, preclude participation in a public benefit program. Denying services to James Zobrest because his

[2] The question of a Free Exercise Clause violation is addressed by other *amici* supporting petitioners in this case and therefore will not be specifically addressed by this *amicus*.

parents chose a religious school for his education exhibits hostility to religion, a philosophy that has been soundly rejected by this Court. *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

B. Providing A State-Paid Sign Language Interpreter To An Individual Student Involves No State-Supported Religious Exercise In Violation Of The Establishment Clause.

Last Term this Court held that the Establishment Clause was violated when state officials directed the performance of a formal religious exercise (*i.e.*, the recitation of a prayer by a clergyman) at a public school graduation ceremony. *Lee v. Weisman*, 112 S. Ct. 2649 (1992). Because the activity appeared to be State-sponsored religious exercise in a public school setting, the majority found that such activity was proscribed thirty years ago by *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). This Court did not apply *Lemon*'s three-part test. No other analytical tools were required. The conclusion was bound directly to the starting point of its analysis: commencement prayer, the Court held, is itself a government-sponsored religious activity in a public school setting.

In other cases, where the facts had been similarly clear, this Court employed the same kind of process to sustain or reject the challenged activity. In *Larson v. Valente*, 456 U.S. 228 (1982), for example, this Court found that discrimination among religions based on their point of view or methods of proselytism violated the Establishment Clause by preferring some kinds of religious expression and activity over others. No three-part test was necessary in order to reach this conclusion. Similarly, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the practice of chaplains opening legislative sessions with prayer was so much a part of American tradition, and indeed part of

the very same Congress that adopted the first amendment, that this Court found it did not need a three-part test or any other elaborate analysis to sustain the challenged activity.

While the *Lemon* test has been criticized by members of this Court [2] and commentators alike,[4] it is not necessary for the Court to apply the *Lemon* test to resolve the constitutional issue presented in this case. The challenged activity is plainly private and does not itself involve any of the concerns that this Court has expressed in its Establishment Clause jurisprudence. It does not involve government sponsorship, financial support, or involvement with religion. *Walz*, 397 U.S. at 668. Indeed, in this case it is simply the provision of an interpreter, a medium by which a deaf child can receive educational information. It is not tax support for religion or religious schools; it is permission for individuals to participate in a public benefit otherwise freely available to all.[5] This case is far removed from the kinds of situations in which this Court felt that public aid was being used for the support, explicit or implicit, of religious institutions. The EHA is a general welfare statute that provides funds to

[2] *See Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. at 108-13 (Rehnquist, J., dissenting); *Roemer v. Board of Public Works*, 426 U.S. 736, 768-69 (1976) (White, J., concurring in judgment).

[4] *See* M. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash. L. Rev. 645, 654-60 (1992); D. Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L.J. 409, 449-50 (1986), and sources cited therein.

[5] Unless this Court acts to reverse the Ninth Circuit, the public benefit will be available only to those families whose children do not attend religiously affiliated schools. This result is contrary to the will of Congress. 20 U.S.C. § 1400(c). If "coercion" is the new touchstone of a majority's analysis, *Lee v. Weisman*, 112 S. Ct. at 2655, it should focus on the not too subtle coercion of families to choose public non-religious schools by manipulating when public benefits are made available.

states to assist them in supplying special services to all children with disabilities within their jurisdictions. 20 U.S.C. § 1400(c). The sole question here is whether providing a sign language interpreter to a deaf student violates the Establishment Clause. The precedents of this Court make clear that it does not.

1. *General Welfare Programs And Statutes That Offer Assistance To A Broad Class Of Individuals Do Not Violate The Establishment Clause.*

The EHA contains no classification based on religion. Despite EHA's broad service mandate, the School District nonetheless refused to provide or pay for an interpreter for James Zobrest solely because of his parents' choice to send him to a religious school. *Zobrest*, 963 F.2d at 1192 & n.1. The Ninth Circuit upheld the School District's decision, reasoning that a state-paid EHA interpreter would create a symbolic link between government and religion and violate the Establishment Clause. *Id.* at 1194. The precedents of this Court dictate a contrary result.

In *Witters v. Wash. Dep't of Services for the Blind*, 474 U.S. 481 (1986), this Court held that the Establishment Clause did not prohibit a state from providing special education funds to an individual with a vision disability who sought to use those funds to obtain a religious education. Certain factors were critical to the Court's decision in *Witters*. Any aid that ultimately flowed to the religious institution did so only as a result of a genuinely independent and private choice by the recipient of the aid. 474 U.S. at 487. The aid was generally available to qualified individuals without regard to the affiliation of the schools attended. *Id.* at 487-88. The program created no incentive or greater benefit for individuals to seek a religious education. *Id.* at 488. Finally, and significantly, the decision where to use the funds was not attributable to the State. *Id.* at 489.

The critical rationale underlying *Witters* was that the individual, not the state, made the decision where to apply a neutrally available public benefit. The failure of the legislative program to restrict choices was not material.

Likewise, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a state statute that allowed an income tax deduction for tuition, textbook and transportation expenses incurred for children attending any elementary and secondary school. The Court emphasized that the deduction was available to all parents. 463 U.S. at 399. Whatever assistance the tax deductions may have provided to religious schools was attributable to the numerous private choices of individual parents of school-age children. *Id.* at 397. Citing *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court concluded that a state program that neutrally and broadly provides a public benefit is not readily subject to challenge under the Establishment Clause. *Mueller*, 463 U.S. at 398-99. In both *Witters* and *Mueller*, this Court was not concerned that private citizens who received benefits under the respective programs might use those benefits to obtain education at a religious school, or even a religious education. The Establishment Clause, after all, limits the choices of *government*, not individuals.

When evaluating a general welfare program that provides neutrally available benefits without regard to religion, the focal point of the Establishment Clause inquiry should be on whether involvement with religion is caused by government or is the result of a private decision. If the latter, the inquiry need go no further because the proximate cause of the involvement with religion cannot be attributed to the state. "[S]tate programs that are wholly neutral in [providing benefits] to a class defined without reference to religion do not violate the [Establishment Clause] because any aid to religion results from the private choices of individual beneficiaries." *Witters*, 474 U.S. at 490-91 (Powell, J., concurring). Govern-

mental assistance which does not induce religious belief or behavior, but instead merely accommodates or implements an independent choice (even a religious one), does not violate the Establishment Clause. *Thomas v. Review Board*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting).

The Zobrests' request for a sign language interpreter falls squarely within the ambit of *Witters* and *Mueller*.[6] The EHA is general welfare legislation that provides special educational services to children with disabilities without regard to the religious affiliation of the schools they attend. That the interpreter provided the services at the religious school attended by James Zobrest was the result of a private independent choice made by the Zobrests, not attributable to any decision of the School District. Surely, if the Establishment Clause does not prohibit a state from paying for the religious education

[6] As indicated above, this case can be resolved without resort to the three-part *Lemon* test. However, even if one were to apply the *Lemon* test, the provision of the interpreter to the Zobrests' child passes that test. No one can seriously dispute that the state has a legitimate secular purpose in providing special education services to children with disabilities. *See Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975). *Witters* and *Mueller*, discussed in the text above, are dispositive of the primary effect component of the test. Government programs like the EHA that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the primary effect test because any aid to religion results from the private choices of individual beneficiaries. *Witters*, 474 U.S. at 490-91 (Powell, J., concurring). Finally, this case does not require excessive governmental entanglement with religion. *See Meek v. Pittenger*, 421 U.S. at 369-70. Any state supervision involved in evaluating the interpreter's job performance does not involve the type of day-to-day, comprehensive and continuing state surveillance of religious activities that *Lemon* contemplated. *Zobrest*, 963 F.2d at 1203 (Tang, J., dissenting). The Establishment Clause does not prohibit the state from providing a hearing aid to a student attending a religious school. The result should be the same with a sign language interpreter. To conclude otherwise exalts form over substance.

of a disabled individual studying to be a minister, it also does not prohibit a state from paying for a sign language interpreter for a deaf child attending a religious high school.[7]

2. *"Symbolic Union" Provides No Principled Basis For Resolving Complex Religion Clause Issues And Should Be Discarded.*

Failing to identify any actual harm within the purposes of the Establishment Clause, the Ninth Circuit concluded that allowing a state-paid interpreter for James Zobrest created a "symbolic union" between government and religion in violation of the Clause. *Zobrest*, 963 F.2d at 1194-95. In essence, "symbolic union" is simply the flip side of the "wall of separation" metaphor. Saying that there can be no symbolic union (whatever that means) is simply another way of saying there must be separation. The difficulty with relying on metaphors to decide constitutional questions is that they often are deceptively misleading and tend to oversimplify delicate and complex issues. This Court has rejected outright the proposition that the first amendment requires a "hermetic separation" between religious and other activities. *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976). So too, "symbolic union" is an idea that is ripe for discard. The symbolic union metaphor will only add further confusion "to the already muddied waters of First Amendment jurisprudence," *Thomas*, 450 U.S. at 720 (Rehnquist, J., dissenting), leading to an isolation of religion in society that was never intended by the Establishment Clause.

[7] In one sense this is an easier case than either *Witters* or *Mueller*. Arguably the programs in those cases involved indirect financial benefits to the religious schools involved. The services provided here did not involve any financial assistance to the religious school attended by James Zobrest. Rather the services (*i.e.*, the sign language interpreter) were provided directly to the individual student with no financial benefit to the school.

Symbolic union was first used in *School District of City of Grand Rapids, v. Ball*, 473 U.S. 373, 389-92 (1985). There, the Court was concerned that providing public school teachers and courses in religious schools might create in the eyes of the students and perhaps the public, an unconstitutional link between government and religion. *Id.* at 385. Notwithstanding its lack of roots in constitutional text or tradition, the principal problem with symbolic union is the dominant role that subjective perceptions play in deciding constitutional issues under that language. It provides no reliable objective standard for courts, administrators, public agencies and citizens to use in understanding and interpreting complex constitutional questions. The breadth of religious diversity in this country ensures that almost every interaction between government and religion will likely be seen by someone as creating a "symbolic union" between government and religion. Cases will be decided, not by reference to outside objective criteria, but according to the individual perceptions and predilections of countless judges throughout the state and federal judicial systems.

One need only look at the present case to see how arbitrary and unworkable is a test that relies on perceptions. The Ninth Circuit concluded that placing a public school employee in a religious school would create the appearance that the School District was a joint sponsor of the school's religious activities. Yet the Ninth Circuit majority never specifically identified *in whose eyes* the appearance was created. The opinion cites no evidence from students, teachers or the public at large. The two judges in the majority must have relied on their own perceptions as to what constitutes a symbolic union. Interestingly, on the same set of facts, the dissenting judge reached a different result. It is reasonable to assume that many others perceive that the same act simply allows James Zobrest to participate in a state program open to all on a fair and equal basis. To them, "symbolic union" may be seen as healthy and equitable cooperation fully consistent with the principle of benevolent neutrality underlying the Religion Clauses."

Unprincipled concepts, like symbolic union, create the potential for disruption of much needed government programs designed to promote the common good by inviting the "hermetic separation" of religion from society decried by the Court in *Roemer*. Judicial concepts have a way of expanding to their logical extremes and, with the passage of time, encompassing much more than originally intended. An example of this phenomenon can be found in the abortion jurisprudence from *Roe v. Wade*, 410 U.S. 113 (1973), through *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). If the instant case is any example, symbolic union is no exception. For some individuals and organizations, feeding the hungry, sheltering the homeless, and healing the sick are religiously motivated activities. Governments and religious organizations cooperate in countless government-funded projects across the country to address pressing societal needs. *See Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding participation of religious organizations in programs under the Adolescent Family Life Act against an Establishment Clause challenge). For some "a crucial symbolic link between government and religion,"[9] may be exactly what is needed to solve important social problems. For others, symbolic union is a sword used to attack longstanding, constitutionally permissible cooperation in the public interest.

Because the symbolic union concept is void of any objective criteria, susceptible to arbitrary and conflicting interpretations, and could threaten many worthwhile co-

[8] Such cooperation is consistent with this country's long history and tradition of church-state relations. M. Chopko, *Religious Access*, *supra* note 4, at 645-52.

[9] *Grand Rapids*, 473 U.S. at 385.

operative endeavors between government and religion and pose no realistic threat of establishing religion this Court should discard it as a determinative factor in Establishment Clause jurisprudence. Rather, the Zobrests' case is bounded by this Court's conclusion in *Witters* and *Mueller* that the Establishment Clause is not infringed by allowing benefits to citizens who are free to choose whether and how to apply them consistent with statutory requirements.

II. DISCRIMINATION AGAINST THE ZOBRESTS BASED ON THEIR RELIGIOUS BELIEFS DENIES THEM THE EQUAL PROTECTION OF THE LAW.

Faced with a federal statute declaring that "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities *in order to assure equal protection of the law*," [10] the Ninth Circuit nevertheless dismissed the Zobrests' equal protection claims with a cryptic footnote.[11] Considering the fact that the School District's discrimination against the Zobrests was admittedly based solely on religion, and that one of the purposes of the EHA is "to assure that the rights of children with disabilities and their parents or guardians are protected," [12] it is frankly inconceivable that a federal court could so blithely deny the Zobrests

[10] 20 U.S.C. § 1400(b)(9) (emphasis added).

[11] "The Zobrests also argue that denying James Zobrest the assistance of a sign language interpreter would violate the Equal Protection Clause. As our analysis above makes clear, in this context the Free Exercise clause does not provide a fundamental right for the Zobrests: they have no entitlement to state support for James' religious education in the form they seek. Nor can the Zobrests show that the state's treatment of James Zobrest is subject to strict scrutiny because he is a member of a protected class. The state's refusal to send a state-paid interpreter into a religious school is rationally related to its goal of avoiding a violation of the First Amendment. Thus, the Zobrests' Equal Protection argument must fail." *Zobrest*, 963 F.2d at 1197 n.6.

[12] 20 U.S.C. § 1400(c).

their right to equal protection under the fourteenth amendment to the Constitution. For the Zobrest family to be denied the benefit of the EHA solely because of James' attendance at a religious school, and for no other reason, is to relegate one group of disabled citizens to a second-class status because they choose to practice their religious beliefs. As will be demonstrated below, this is not only constitutionally impermissible, it is repugnant to the very idea of individual equality before the law.[13]

A. The Zobrests' Fundamental Rights Are Abridged By The School District's Denial Of EHA Benefits.

The Zobrests had sent their son to non-religious private and public schools until he reached high school age. At that time, after considering their alternatives, the Zobrests chose to send their son to Salpointe Catholic High School. Their decision had more to do with the values they seek for their son than anything else. *Zobrest*, 963 F.2d at 1192. The State, not so subtly, would manipulate that decision by denying this family a benefit that would be available if they had continued to choose any school except a religious school. The Zobrests do not seek benefits not available by law, or even to expand a class of beneficiaries beyond what Congress intended. They only seek what Congress promised would be equally available to them regardless of the religiously motivated, conscientious choice they made. Refusal to honor that

[13] The School District has announced to this Court its intention to deny the Zobrest family EHA assistance even if such aid does not offend the Establishment Clause. *See* Respondent's Brief in Opposition to Petition for Writ of Certiorari, 12-13. While admitting that the Zobrests are entitled to the interpreter they seek as a "related service" under the EHA regulations, the School District continues to claim that those regulations bar aid to families whose children attend parochial schools. If Respondent's interpretation of the regulations were correct, which it is not, the Federal denial of due process under the fifth amendment would be just as egregious, and impermissible, as Arizona's denial of equal protection. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

promise is invidious discrimination on account of religion, and impairs the Zobrests' fundamental rights.

The Ninth Circuit acknowledged, in the decision under review, that "denial of aid to the Zobrests does impose a burden on their free exercise rights. . . ." *Zobrest*, 963 F.2d at 1196. Nonetheless, the court says two more things about free exercise rights. First it says that they are "not fundamental" "in this context." *Id.* at 1197 n.6. And it says they may be infringed. *Id.* at 1197. Although the opinion attempts to justify limitations of free exercise rights,[14] the *existence* of the Zobrests' rights is clear. Indeed, neither the Ninth Circuit nor the School District would dare suggest that the free exercise of religion is not a fundamental right under the first and fourteenth amendments.[15] The very reason our first amendment rights have been incorporated into the fourteenth amendment and enforced against the states is that they are "fundamental to the American scheme of justice" [16] and "so rooted in the traditions and conscience of our people as to be as fundamental." [17]

Faced with such a clear and universally held proposition, the circuit court says that "in this context" free

[14] The court's justification for denial of free exercise rights is the purported existence of an Establishment Clause violation. The Ninth Circuit finds a conflict in the Religion Clauses and, rather than seek a unifying construction, resolves the conflict by allowing establishment concerns to "trump" free exercise concerns. It cites the Fourth Circuit's decision in *Goodall v. Stafford Co. Sch. Bd.*, 930 F.2d 363 (4th Cir. 1990), *cert. denied*, 112 S. Ct. 188 (1991) as authority, but the authority of this Court is actually to the contrary. *E.g.*, *Widmar*, 454 U.S. at 273 (Establishment Clause concerns "did not justify infringement of other first amendment rights"). Moreover, as indicated in part I of this brief, there is no Establishment Clause violation.

[15] *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

[16] *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

[17] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

exercise is not a fundamental right of the Zobrest family. *Zobrest*, 963 F.2d at 1197 n.6. Not only does the court never explain what context is being asserted, but the court does not even attempt to explain why one family does not enjoy the same fundamental rights as another. All the court says is that the Zobrests "have no entitlement to state support for James' religious education in the form they seek." *Id.* As is abundantly clear, however, the Zobrests do not seek state support for religious education in any form. They seek only the sign language interpreter James and all other deaf high school students are entitled to under the EHA.

It is possible that by using the phrase "in this context" to deny the Zobrests their fundamental first amendment right, the court is suggesting that by sending James to a Catholic school at their own expense the Zobrests are not exercising their religion. This unlikely interpretation fails for at least three reasons. First, as noted previously, the court admits elsewhere that the family's free exercise rights are being burdened. *Zobrest*, 963 F.2d at 1196. Second, the parties stipulated and the court accepted that the Zobrests acted on sincerely held religious beliefs in choosing to send James to Salpointe Catholic High School. *Id.* at 1192. Third, and most revealing however, is the conduct and motivation of the School District and the lower courts. In denying EHA assistance to James, they acted solely because of religion. *Id.* To put it another way, the only basis the State had for discriminating against the Zobrests was their religiously motivated conduct. *Id.* at 1192 n.1. If there ever was any doubt about whether the Zobrests were exercising their fundamental right to free exercise in sending James to Salpointe, the School District and the Federal courts resolved that issue clearly.

It is also clear that in choosing a religious school education for James, his parents were exercising another of their fundamental constitutional rights. The right of

parents to direct the education of their children was affirmed explicitly by this Court as recently as 1990 in *Employment Division v. Smith*, 494 U.S. 872, 881 (1990). Even before that specific affirmation of parental rights, however, this Court's opinions had emphasized "the rights of parents to direct the religious upbringing of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). For purposes of equal protection analysis, therefore, there is no doubt that the Zobrests' fundamental rights are at risk in this case.

B. Distinctions Based Upon Religion Are Inherently Suspect Under the Equal Protection Clause.

As discussed above, the Ninth Circuit classified James Zobrest solely on the basis of religion in order to deny him the benefits of the EHA. *Zobrest*, 963 F.2d at 1192. Thereafter it asserted that James Zobrest is not a member of a "protected class" for purposes of equal protection analysis. *Id.* at 1197 n.6. Therefore, the circuit court must have been presuming that religion is not an inherently suspect classification under the fourteenth amendment. On the contrary, the first amendment makes religion a protected class. *Torcaso v. Watkins*, 367 U.S. 488, 491-92 (1961). In *Smith* the special status of religion for equal protection purposes was made explicit:

> Just as we subject to the most exacting scrutiny laws that make classifications based on race . . . or the content of speech . . ., so too we strictly scrutinize governmental classifications based on religion.

Smith, 494 U.S. at 886 n.3 (citations omitted).

McDaniel v. Paty, 435 U.S. 618 (1978), is particularly instructive. This Court viewed Tennessee's prohibition against clergy serving in the state legislature as being directed against the "status, acts, and conduct" of a minister or priest. *Id.* at 627. Such a prohibition, the Court said, violates the special protection granted religion by the Free Exercise Clause of the first amend-

ment.[18] *Id.* Justice White found that the primary problem with the Tennessee law was its denial of equal protection to members of the clergy, because it disqualified a class of citizens from holding elective office based upon their practice of religion. *Id.* at 643 (White, J., concurring); *see also Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring). Nowhere in this Court's opinions, however, is there a more poignant denunciation of discrimination based on religion than former Chief Justice Burger's opinion in *Meek v. Pittenger*:

> The melancholy consequence of what the Court does today is to force the parent to choose between the "free exercise" of a religious belief by opting for a sectarian education for his child or to forgo the opportunity for his child to learn to cope with—or overcome—serious congenital learning handicaps, through remedial assistance financed by his taxes. Affluent parents, by employing private teaching specialists, will be able to cope with this denial of equal protection, which is, for me, a gross violation of Fourteenth Amendment rights, but all others will be forced to make a choice between their judgment as to their children's spiritual needs and their temporal need for special remedial learning assistance. One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited *aid to children* is not a step toward establishing a state religion—at least while this Court sits.

[18] Justice Brennan, considering the law violative of the Establishment Clause as well, said that "it establishes a religious classification—involvement in protected religious activity—governing the eligibility for office, which I believe is *absolutely prohibited*." *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring) (emphasis added).

421 U.S. at 387 (Burger, C.J., concurring in the judgment in part and dissenting in part) (emphasis added). From a fourteenth amendment perspective, religion is indeed a suspect classification under the Equal Protection Clause, calling for strict scrutiny by this Court.[19]

C. Religious Discrimination Against The Zobrest Family Cannot Survive Strict Scrutiny.

Faced with the Zobrests' argument that they were being denied equal protection of the law, the Ninth Circuit utilized the "rational basis" test and held that "[t]he state's refusal to send a state-paid interpreter into a religious school is rationally related to its goal of avoiding a violation of the First Amendment." *Zobrest*, 963 F.2d at 1197 n.6. The holding is incorrect in its failure to apply strict scrutiny, its presumption that the Establishment Clause would be violated, and its conclusion that avoidance of such a violation is an overriding goal for the state. As discussed in part I of this brief *amicus curiae*, the Establishment Clause is not violated by the provision of a sign language interpreter to James Zobrest, and as examined in parts II, A and B, strict scrutiny is unquestionably the appropriate standard in cases of discrimination based upon religion.

The strict scrutiny standard requires the State to show that discriminatory action is necessary to serve a compelling state interest and is the least restrictive means to that end. *Widmar*, 454 U.S. at 270. Just as importantly, the State bears a heavy evidentiary burden to prove that the strict scrutiny standard is met. *Healy v. James*, 408 U.S. 169, 184 (1972). The only question remaining for an equal protection analysis of this case, therefore, is whether the School District has

[19] *Smith*, 494 U.S. at 886 n.3. For a more exhaustive analysis of why religion qualifies as a suspect classification, see T. Hall, *Religion, Equality, and Difference*, 65 Temp. L. Rev. 1 (Spring 1992).

met its heavy burden of showing that the discrimination against James Zobrest was justified by a compelling state interest.

The School District proposed only one justification for its discriminatory conduct—avoiding a violation of the Establishment Clause. The sole concern was that the state-paid interpreter's presence at Salpointe High School might give the appearance of endorsing religion. The School District offered no proof that this would be the result, but simply argued that avoidance of the risk justified violating James' free exercise rights.[20] A similar argument was put forward by the University of Missouri in *Widmar*, 454 U.S. at 270-71. In that case, the Court was willing to allow for the possibility that complying with other constitutional obligations *may* constitute a compelling state interest under some circumstances;[21] however, the Court found that "[t]he University's argument misconceives the nature of the case." *Id.* at 273. Similarly, the School District's argument here misinterprets the nature of this case. Just as the University had opened its meeting facilities and then sought to exclude religious groups, EHA assistance is offered to all students with disabilities while James Zobrest is excluded solely on religious grounds.

In addition, the fact that the open forum policy might benefit religious groups at the University was considered incidental and not violative of the Establishment Clause. This was true for two reasons: (1) the open forum was not an endorsement of religion but of equal treatment

[20] *See Wisconsin v. Yoder*, 406 U.S. at 221:

> Where fundamental claims of religious freedom are at stake, however, we cannot accept . . . a sweeping claim [of compelling state interest]; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption.

[21] *Widmar*, 454 U.S. at 271.

for all student groups; and (2) numerous other groups took advantage of the benefits the forum offered. *Widmar*, 454 U.S. at 274-75. The same factors pertain here: (1) treating James Zobrest like all other high school students advances fairness and equality, not religion; and (2) disabled students receiving EHA assistance at parochial schools could never be more than a minute percentage of the total public school students benefitted by the program. Perceived correctly, therefore, it is obvious that the School District's fear of a possible Establishment Clause violation is illusory. The proper focus is on James Zobrest's statutory and constitutional right to equal protection of the laws.[22]

Even if there were a colorable Establishment Clause claim, it is not at all clear that a possible violation of the Establishment Clause is ever sufficient to justify infringement of other constitutional guarantees. One contemporary commentator has stated that "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers." L. Tribe, *American Constitutional Law* 834 (1978). Likewise, a construction of the Constitution that subordinates the Equal Protection Clause to the Establishment Clause ignores the generative history of the Constitution. More than that, such an interpretation would be a logical absurdity and an abuse of basic constitutional principle. *Ullmann v. United States*, 350 U.S. 422, 428 (1956) ("As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion.").

Returning to the clergy disqualification statute at issue in *McDaniel v. Paty* is again instructive. Tennessee

[22] This focus also eliminates any claim of a regulatory or State constitutional basis for discriminating against the Zobrests. *See* note 13, *supra; see also Widmar*, 454 U.S. at 275-76 (State constitution did not provide compelling state interest sufficient to overcome fundamental right to freedom of expression).

also made the argument that its prohibition was necessary to avoid religious establishments. 435 U.S. at 628. The Court not only rejected the argument but Justice Brennan, in his concurrence, emphasized that the Establishment "Clause will not permit, much less excuse or condone, the deprivation of religious liberty here involved." *Id.* at 640 (Brennan, J., concurring). To allow the School District in this case to use the Establishment Clause to remove James Zobrest from the class of EHA beneficiaries is equally unjustified.

Finally, although an equal protection analysis is not necessary in every case implicating the Religion Clauses,[23] where individuals are excluded from general welfare programs solely or primarily for religious reasons, equal protection analysis is appropriate and promotes the constitutional values of fairness and equality. The *Witters* case, which bears such an important resemblance to this case, is an example of a situation where an equal protection analysis reaches the correct and constitutionally mandated result:

> *Witters* is an easy case under the equal protection model. Witters asked only that he be accorded the same treatment as others similarly situated, and that his religious career choice be respected as one which he was entitled to pursue. Plainly, there is no establishment clause problem in such equal treatment. Just as plainly, to single-out Witters for ex-

[23] Some commentators have, to varying degrees, suggested consideration of such an approach. T. Hall, *Religion, Equality, and Difference, supra* note 19; M. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach To Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311 (1986); *see generally* I. Lupu, *Keeping the Faith: Religion, Equality, and Speech in the U.S. Constitution*, 19 Conn. L. Rev. 739 (1986); A. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 Ohio St. L.J. 89 (1980); K. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

clusion from the vocational-aid program in these circumstances in an obvious denial of equal protection with respect to religious exercise.[24]

James Zobrest is, just as plainly, a victim of invidious religious discrimination and is, like Larry Witters, entitled to relief from this Court.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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[24] M. Paulsen, *supra* note 23, at n.264.